

Silveron Builders Sdn Bhd v YHL Property Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO J-02(IM)(NCvC)-194-02 OF 2024
MOHD NAZLAN, CHOO KAH SING AND FAIZAH
JAMALUDIN JJCA
8 AUGUST 2025

Land Law — Caveats — Wrongful lodgment — Appellant's wrongful lodgment of caveat disabled developer from using respondent's land as security to obtain bank loans to develop the land — Developer had to obtain short-term loans from other sources at higher interest rates to finance the project — Respondent under joint-venture agreement with developer indemnified latter for the additional financing costs it had incurred — Whether indemnified costs were reasonably foreseeable damages arising from wrongful lodgment of the caveat — Whether respondent was entitled to recover said damages from appellant under s 329(1) of the National Land Code when court ordered removal of the caveat

The respondent ('YHL') entered into a joint venture agreement ('JVA') with a developer to develop YHL's land. The JVA obliged YHL to enable the land to be used as security for the developer to obtain bank loans to finance the development. After having secured, in principle, the grant of two loans totalling RM36m from two banks conditional upon the registration of third-party charges on the land in their favour, and having paid RM60,000 in stamp duty on YHL's behalf in respect of the creation of one of the charges, the developer found that the charges could not be registered due to the lodgment of a caveat on the land by the appellant ('Silveron') which it refused to remove. This caused the banks to refuse to drawdown on the promised loans, forcing the developer to take short-term financing from other sources at higher interest rates to finance the development project. YHL indemnified the developer for the additional financing costs it had incurred and when it applied to the High Court for removal of the caveat, YHL sought compensation of RM1,022,472.35 from Silveron under s 329(1) of the National Land Code ('the NLC') as damages for wrongful entry of the caveat. The High Court ordered the removal of the caveat (against which Silveron did not appeal) but awarded YHL only RM748,931.37 as compensation. The court held that the balance of RM273,540.98 claimed by YHL concerned two further caveats (which were subsequently removed) which Silveron had entered on the land after the order for removal of the caveat was made. As such, the court held that YHL should claim the RM273,540.98 from Silveron in a separate suit. In its instant appeal against the award of damages, Silveron argued that: (a) any loss, if any, suffered as a result of the entry of the caveat was solely the developer's and

A not YHL's because under the JVA, all expenses were to be borne by the developer and there was no provision obliging YHL to indemnify the developer for any damages; (b) since the developer was not named as a party to the proceedings, YHL had improperly pursued a claim on the developer's behalf; and (c) YHL had failed to mitigate losses, if any.

B

Held, unanimously affirming the High Court's decision and dismissing the appeal:

- C (1) YHL was not contractually obliged under the JVA to indemnify the developer for the additional financing costs incurred by the latter. The natural and ordinary meaning of the words in cl 3.1(a) of the JVA was plainly facilitative and concerned procedural and administrative co-operation between the parties for the advancement of the development project. No financial liability was created. The phrase
- D 'general assistance' could not be interpreted to include indemnity for losses arising from the independent legal wrong of a third party, such as the lodgment of the wrongful caveat. The wordings in cl 3.1(a) did not meet the business efficacy test and officious bystander test required to imply a term in a contract (see paras 25–27).
- E (2) Silveron's wrongful caveat caused YHL to breach cl 4.1 of the JVA under which it was obliged to provide the land as security for loans to be obtained by the developer. Since the charges on the land could not be registered in favour of the banks because of the caveat, YHL had to
- F indemnify the developer to mitigate the losses caused by its breach of cl 4.1 and to preserve the commercial viability of the development project. YHL's indemnification of the additional financing costs incurred by the developer — ie, the difference between the interest rates charged under the Maybank and RHB loans and the short-term financing the
- G developer had to incur and the stamp duty it had paid for the cancelled Maybank loan — was a commercially necessary response to mitigate the reasonably foreseeable financial losses caused by Silveron's wrongful entry of the caveat (see paras 48, 51 & 53).
- H (3) The High Court did not err in awarding YHL compensation in the sum of RM748,931.37 with interest at the rate of 5%pa from 15 July 2020 until full payment (see para 56).

[Bahasa Malaysia summary]

- I Responden ('YHL') telah menandatangani satu perjanjian usaha sama ('JVA') dengan seorang pemaju untuk membangunkan tanah milik YHL. JVA tersebut mewajibkan YHL untuk membenarkan tanah itu digunakan sebagai cagaran bagi pihak pemaju untuk mendapatkan pinjaman bank bagi membiayai pembangunan tersebut. Selepas berjaya mendapatkan kelulusan dua pinjaman berjumlah RM36 juta daripada dua bank tertakluk kepada pendaftaran

gadaian pihak ketiga ke atas tanah tersebut bagi kepentingan mereka, dan selepas membayar duti setem sebanyak RM60,000 bagi pihak YHL mengenai pendaftaran salah satu gadaian itu, pemaju mendapati bahawa gadaian tersebut tidak dapat didaftarkan kerana terdapat satu kaveat yang telah dimasukkan ke atas tanah oleh perayu ('Silveron') yang enggan ditarik balik. Keadaan ini menyebabkan pihak bank menolak untuk membuat pengeluaran pinjaman yang dijanjikan, memaksa pemaju mendapatkan pembiayaan jangka pendek daripada sumber lain dengan kadar faedah yang lebih tinggi untuk membiayai projek pembangunan tersebut. YHL kemudiannya membayar ganti rugi kepada pemaju bagi kos pembiayaan tambahan yang telah ditanggungnya dan apabila memohon ke Mahkamah Tinggi untuk pengeluaran kaveat tersebut, YHL menuntut pampasan sebanyak RM1,022,472.35 daripada Silveron di bawah s 329(1) Kanun Tanah Negara ('KTN') sebagai ganti rugi atas kemasukan kaveat yang salah. Mahkamah Tinggi memerintahkan kaveat tersebut dikeluarkan (yang mana Silveron tidak membuat rayuan), tetapi hanya memberikan pampasan sebanyak RM748,931.37 kepada YHL. Mahkamah berpendapat bahawa baki tuntutan sebanyak RM273,540.98 oleh YHL adalah berkaitan dengan dua lagi kaveat (yang kemudiannya dikeluarkan) yang telah dimasukkan oleh Silveron ke atas tanah tersebut selepas perintah pengeluaran kaveat dibuat. Oleh itu, mahkamah memutuskan bahawa YHL hendaklah menuntut RM273,540.98 tersebut daripada Silveron dalam satu tindakan berasingan. Dalam rayuan ini terhadap ganti rugi tersebut, Silveron menghujahkan bahawa: (a) sebarang kerugian, jika ada, adalah berpunca dari kemasukan kaveat itu dan sepatutnya ditanggung oleh pemaju dan bukannya YHL kerana di bawah JVA, semua perbelanjaan perlu ditanggung oleh pemaju dan tiada peruntukan yang mewajibkan YHL menanggung rugi pemaju bagi sebarang kerugian; (b) memandangkan pemaju tidak dinamakan sebagai pihak dalam prosiding, YHL secara tidak wajar telah menuntut bagi pihak pemaju; dan (c) YHL telah gagal untuk mengurangkan kerugian, jika ada.

Diputuskan, sebulat suara mengekalkan keputusan Mahkamah Tinggi dan menolak rayuan:

- (1) YHL tidak terikat secara kontrak di bawah JVA untuk menanggung rugi pemaju mengenai kos pembiayaan tambahan yang ditanggung oleh pemaju tersebut. Maksud semula jadi dan biasa bagi klausa 3.1(a) JVA adalah jelas untuk membantu keperluan pentadbiran antara pihak-pihak bagi tujuan memajukan projek pembangunan. Ianya tidak mewujudkan sebarang tanggungan kewangan. Frasa 'general assistance' juga tidak boleh ditafsirkan sebagai termasuk tanggungjawab untuk menanggung rugi kerugian yang timbul daripada kesalahan undang-undang bebas pihak ketiga, seperti kemasukan kaveat yang salah. Klausa 3.1(a) juga tidak memenuhi ujian *business efficacy* dan *officious bystander* yang

- A diperlukan untuk menyiratkan sesuatu terma dalam kontrak (lihat perenggan 25–27).
- (2) Kaveat salah yang dimasukkan oleh Silveron telah menyebabkan YHL melanggar klausa 4.1 JVA yang mewajibkannya menyediakan tanah sebagai cagaran bagi pinjaman yang akan diperoleh oleh pemaju. Oleh kerana gadaian ke atas tanah tidak dapat didaftarkan memihak kepada pihak bank disebabkan kaveat tersebut, YHL terpaksa menanggung rugi pemaju bagi mengurangkan kerugian yang timbul akibat pelanggaran klausa 4.1 dan untuk mengekalkan perjalanan komersial projek pembangunan tersebut. Kerugian oleh YHL terhadap kos pembiayaan tambahan yang ditanggung pemaju — iaitu perbezaan antara kadar faedah yang dikenakan di bawah pinjaman Maybank dan RHB dengan pembiayaan jangka pendek terpaksa ditanggung oleh pemaju serta duti setem yang telah dibayarnya bagi pinjaman Maybank yang dibatalkan adalah suatu langkah komersial yang perlu bagi mengurangkan kerugian kewangan yang munasabah boleh dijangka akibat kemasukan kaveat salah oleh Silveron (lihat perenggan 48, 51 & 53).
- (3) Mahkamah Tinggi tidak melakukan sebarang kesilapan ketika menganugerahkan pampasan kepada YHL berjumlah RM748,931.37 dengan faedah pada kadar 5% setahun bermula 15 Julai 2020 sehingga bayaran penuh dibuat (lihat perenggan 56).
- F Cases referred to**
Cheng Chin Chong v Shak Heng & Sons Sdn Bhd [1982] 1 MLJ 160; [1981] CLJ 91 (refd)
Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors [1997] MLJU 310; [1998] 1 BLJ 244; [1998] 1 CLJ Supp 244, HC (refd)
- G** *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; [1995] 2 AMR 969, CA (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336; [1992] CLJU 22, HC (refd)
- H** *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) on appeal from the Supreme Court of New South Wales* [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126, PC (refd)
Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [2003] 6 MLJ 279; [2003] 7 CLJ 24, HC (refd)
- I** *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Cop Dyeing Company, Limited* [1918] 1 KB 592, CA (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1995] MLJU 276; [1995] 3 CLJ 256, HC (refd)

Legislation referred to

Contracts Act 1950 s 74

Moneylenders Act 1951

National Land Code s 329(1), Form 16A

A

Appeal from: *YHL Property Sdn Bhd v Silveron Builders Sdn Bhd* [2024] MLJU 378 (High Court, Johor Bahru)

B

Mohammad Danial bin Hazizan (S Ravenesan) for the appellant.
Wong Wan Ting (Gan & Lim) for the respondent.

C

Faizah Jamaludin JCA:

INTRODUCTION

[1] This is an appeal by the appellant regarding the Johor Bahru High Court's award of RM748,931.37 in damages to the respondent, related to a wrongful caveat lodged by the appellant on the respondent's land under Master Title Geran No 75853, Lot No 15309, Daerah Johor Bahru, Bandar Johor Bahru, Negeri Johor Darul Ta'azim ('land').

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[2] The main issue in this appeal is whether the appellant is liable to pay the respondent compensation under s 329(1) of the National Land Code ('the NLC'), specifically for an amount equal to what the respondent paid the developer for additional financing costs arising from the appellant's wrongful caveat on the land.

F

BACKGROUND FACTS

[3] The respondent had entered into a joint venture agreement ('JVA') with Vistana Tropika Sdn Bhd ('the developer') on 8 June 2018 for the development of a project on the land ('the project').

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[4] The caveat at issue in this appeal is the second caveat, which was wrongfully lodged by the appellant on the land on 18 July 2019. The Registrar of Titles previously removed the appellant's first caveat on the land in 2009.

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[5] Following the lodging of the second caveat, the respondent's solicitors issued a written notice on 6 December 2019 requesting that the appellant withdraw the caveat from the land title and advising that any damages sustained due to the wrongful caveat could be substantial. Despite this, the appellant declined to withdraw the second caveat, prompting the respondent to apply to the Johor Bahru High Court seeking its removal.

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- A** [6] On 15 July 2020, the High Court ordered the removal of the second caveat and for the losses suffered as a result of the caveat to be assessed and paid to the respondent pursuant to s 329(1) of the NLC.
- B** [7] The appellant did not appeal against the High Court's order for removal of the second caveat. Instead, it lodged a third and fourth caveat on the land. The appellant's third caveat was subsequently withdrawn and the High Court on 5 October 2020 ordered the removal of the fourth caveat.
- C** [8] Under cl 4.1 of the JVA, the developer may obtain loan facilities from financial institutions for bridging financing related to the development of the project, and the respondent is required to provide the land as security for the loan and to promptly execute charges and other security documents in favour of the financiers. Clause 4.1 states:
- D** 4.1 The JV Partner shall be allowed to obtain the necessary loan facilities from financial institutions (hereinafter referred to as the 'Financier') specifically for bridging financing purposes in the implementation of the Development (hereinafter referred to as the 'Loan') with the Owner providing the Said Land as security for the Loan granted for the Development. The Owner shall promptly execute all such charges and/or other encumbrances as may from time to time hereafter be required by the JV Partner [the Developer] to be created in favour of the Financier in relation to the Loan.
- E**
- F** [9] For the purpose of the development of the project, the developer had on 5 July 2019 obtained a loan from Malayan Banking Bhd ('Maybank') for working capital in the sum of RM12m at the interest rate of 7.65%pa. On 15 January 2020, it obtained a loan in the sum of RM24m from RHB Bank Bhd ('RHB') for the purpose of the building construction works of the project at the interest rate of 6.70%pa.
- G**
- H** [10] Both loans were conditional upon the registration of a third-party charge on the land in favour of Maybank and RHB respectively as security for the loans. The respondent is contractually obliged under cl 4.1 of the JVA to provide the land as security for the loans. The developer had paid stamp duty to the Lembaga Hasil Dalam Negeri ('LHDN') in the sum of RM60,000 on the respondent's behalf for the registration of the Form 16A (Charge Instrument) in favour of Maybank for the RM12m loan. However, because of the appellant's second caveat on the land, the third party charges in favour of
- I** Maybank and RHB could not be registered.
- [11] As a result of the non-registration of the third-party charge in its favour, Maybank cancelled its loan and RHB refused to drawdown the loan whilst the second caveat was still lodged on the title of the land. In order to continue with

the development of the project, the developer had to take short-terms loans from other sources for the sum of RM12m and RM24m at the higher interest rate of 12%pa.

[12] The 'Additional Financing Costs' borne by the developer (and indemnified by the respondent to the developer), as a result of the second caveat are items (I) to (IV) below. Item (V) was caused by the appellant's third and fourth caveats on the land:

No	Description	Amount (RM)
(I)	Stamp duty paid for the Maybank Charge instrument that could not be presented due to the caveat.	60,000
(II)	Extra interest on RM12m (for period from 15 December 2019 to 31 December 2019): RM12m x 4.35%pa x 16/365 days	22,882.19
(III)	Extra interest on RM12m (for period from 1 January 2020 to 15 July 2020): RM12m x 4.35%pa x 197/365 days	280,967.21
(IV)	Extra interest on RM24m (for period from 21 February 2020 to 15 July 2020): RM12m x 4.05%pa x 16/365 days	385,081.97
(V)	Extra interest on RM12m (for period from 16 July 2020 to 27 October 2020): RM24m x 4.05%pa x 103/365 days	273,540.98
TOTAL		1,022,472.35

[13] The compensation claimed by the respondent at the High Court as damages for the wrongful caveat was RM1,022,472.35. It was the amount of indemnity paid by the respondent to the developer for additional financing costs that resulted from the wrongful second, third and fourth caveats lodged by the appellant on the land. The sum was paid by the respondent to the developer by an AmBank Islamic cheque dated 12 November 2020.

[14] The Johor Bahru High Court only awarded the sum of RM748,931.37, which was the amount of indemnity paid by the respondent to the developer for the additional financing costs as a result of the second caveat. The balance of RM273,540.98 loss was caused by the appellant's third and fourth caveat on the land. The learned High Court judge in his para 15 of his grounds of judgment held that as the costs in item (V) above was caused by the appellant's third and fourth caveats, the said sum will be the subject-matter of a separate claim by the respondent against the appellant.

- A [15] The appellant being dissatisfied with the High Court's decision filed this appeal, for this court to set-aside the High Court's award of damages to the appellant.

The appellant's case

- B [16] The appellant's case is that the High Court was wrong in granting damages to the respondent for the wrongful second caveat on the land. The appellant contends that the additional financing costs suffered as a result of the caveat were the developer's and not the respondent's.

- C [17] The appellant submits that based on the JVA there were no actual losses suffered by the respondent because under the JVA all expenses are to be borne by the developer. It claims that under recital (C), and cll 2.1, 4.2, 4.3, 9 and 10 of the JVA that 'any and all expenses are to be borne by Vistana [the Developer]'.
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- E [18] The appellant further submits that the respondent's obligation under the JVA is only to furnish the land for development by the developer. It argues that there is no express requirement under the JVA for the respondent to provide the land free from encumbrances or to indemnify the developer for losses suffered by the latter as a result of any wrongful caveats on the land.

- F [19] In addition, the appellant submits that since the developer was not party to the proceedings at the High Court, the respondent is improperly pursuing a claim for damages on behalf of the developer, who is a stranger to the proceedings.

- G [20] Finally, the appellant argues that the respondent failed to mitigate its losses because the developer had accepted the financing facilities offered by RHB through its letter dated 15 January 2020 when the respondent already knew of the presence of the second caveat on the land. It contends that the respondent and/or the developer took an unreasonable risk in accepting the bridging loan from RHB.
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The respondent's case

- I [21] The respondent's case is that the appellant's improper lodging of the second caveat on the land prevented the registration of third-party charges in favour of Maybank and RHB, which were required to secure the loan facilities essential for the development of the project. As a consequence, the developer was compelled to incur the additional financing costs by obtaining alternative loans for its working capital and construction activities related to the project.

The respondent contends that under the terms of the JVA, the respondent is obliged to indemnify the developer for these costs.

A

ISSUES

[22] The Johor Bahru High Court compensated the respondent for the wrongful second caveat on the land by awarding the amount the respondent had paid the developer for its additional financing costs caused by the said caveat.

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[23] The issues for our determination in this appeal are:

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- (a) whether the respondent is contractually obliged to indemnify the developer under the JVA; and
- (b) whether the respondent is entitled to compensation under s 329(1) of the NLC for the sum it had indemnified the developer due to the wrongful caveat on the land?

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Is there a contractual obligation for the respondent to indemnify the developer under the JVA?

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[24] The respondent's counsel had submitted that the respondent is contractually obliged under cl 3.1(a) of the JVA to indemnify the developer for losses it suffered as a result of the appellant's wrongful caveat on the land. Clause 3.1(a) states:

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The Owner will endeavour to give and render such general assistance and sign and do all such acts and things as may from time to time be reasonably required to ensure success of the Development.

[25] From the natural and ordinary meaning of the words in cl 3.1(a) of the JVA, we find that the clause is plainly facilitative. It aims to foster cooperation between the respondent and the developer in matters of administration and execution of the development of the project, rather than create financial liability. In particular, the phrase 'general assistance' cannot be interpreted to include indemnity for losses arising from the independent legal wrong of a third party, such as the lodgement of wrongful caveat.

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[26] In addition, we find that cl 3.1(a) of the JVA does not support an implied indemnity obligation since the clause contemplates procedural and administrative cooperation and not substantive financial liability. Moreover, the wordings in the clause do not meet the business efficacy test and officious bystander test required to imply a term in a contract: see *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1995] MLJU 276; [1995] 3 CLJ 256 (HC) following the English case of *Reigate v Union Manufacturing Company*

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A *(Ramsbottom), Limited and Elton Cop Dyeing Company, Limited* [1918] 1 KB 592.

B [27] Therefore, we find that the respondent does not have a contractual obligation under the cl 3.1(a) of the JVA to indemnify the developer for the additional financing costs.

Is the respondent entitled to compensation under s 329(1) of the NLC?

C [28] Although the respondent does not have a contractual obligation to indemnify the developer under cl 3.1(a) of the JVA, the question is whether the respondent is statutorily entitled to compensation under s 329(1) of the NLC for the amount paid in indemnifying the developer of the additional financing costs due to the wrongful caveat on the land.

D [29] Section 329(1) of the NLC creates a statutory right to compensation where a person suffers loss or damage owing to a caveator's failure to withdraw or remove a wrongful caveat. It reads:

E 329 Compensation for wrongful caveats, and limitation on repeated applications
(1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

F [30] The applicable legal principles governing claims for compensation under s 329(1) of the NLC are:

G (a) to succeed in a claim for compensation for the wrong entry of a caveat, the claimant must prove to have suffered damage or loss by reason of the wrongful entry: see *Cheng Chin Chong v Shak Heng & Sons Sdn Bhd* [1982] 1 MLJ 160; [1981] CLJ 91 (HC);

H (b) compensation can only be awarded for actual damages that are reasonably foreseeable. *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor*; *Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310; [1998] 1 BLJ 244; [1998] 1 CLJ Supp 244 (HC); and

I (c) courts will not award damages where the claimant fails to prove actual loss. The claimant must prove that the damages suffered are real and actual: *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336; [1992] CLJU 22 (HC).

[31] Judith Sihombing in her book, *National Land Code: A Commentary* (2021 Desk Edition) at para 1032 states:

The subsection [329(1) NLC] purports to create to compensation whenever a private

caveat is wrongfully entered, or allow a caveat to remain on the register. However, it would see that the better view is that action may be taken only when such entry or failure to withdraw results in actual loss or damage: s 74 of the Contracts Act 1950 (Act 136) (see Chapter III); *Cheng Chin Chng v Shak Heng & Sons Sdn Bhd* [1982] 1 MLJ 160. (Emphasis added.)

A

B

[32] Abdul Malik Ishak J in *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279; [2003] 7 CLJ 24 (HC) said the following as regards s 329(1) of the NLC:

In my view, s 329(1) of the NLC creates a right of action where there is a malicious or a negligent and incorrect entry of a private caveat or a failure to withdraw a private caveat. But of course, the best view to adopt in construing s 329(1) of the NLC is this. That an action against any person or body for lodging the private caveat ‘wrongfully or without reasonable cause’ *would be in a situation where the entry of such private caveat or the failure to withdraw such private caveat would result in actual damage.* Owen J in *Lachaume v Broughton* [1903] 3 SR (NSW) 475, at p 480 aptly said:

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The gist of the action is not the maliciously and falsely setting up a title to property, but the damages that may arise from it. (Emphasis added.)

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[33] In order for the respondent to succeed in a claim for compensation against the appellant under s 329(1) of the NLC, two conditions must be met:

- (a) the private caveat lodged by the appellant was entered either wrongfully or without reasonable cause; and
- (b) the respondent experienced actual damages or losses as a result of the lodgement of the private caveat.

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[34] Given that the Johor Bahru High Court in its decision dated 15 July 2020 had found that the second caveat lodged by the appellant on the land was wrongfully entered and had ordered for its removal — a decision which the appellant did not appeal against — means that the respondent had satisfied the first limb of s 329(1) of the NLC.

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[35] As regards the second limb of s 329(1) NLC, the question to be answered is whether the respondent suffered actual damages or loss as a result of the appellant’s second caveat on the land.

[36] This court in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; [1995] 2 AMR 969 (‘Luggage Distributors’) held that the private caveat lodged by the respondents in that case, was wrong because as tenants they did not have a caveatable interest in the land, and ordered for the caveat to be removed.

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- A [37] In *Luggage Distributors*, the land owner (Luggage Distributors (M) Sdn Bhd) had entered into a sale and purchase agreement ('SPA') with the purchaser (Quill Construction Sdn Bhd ('Quill')) for the sale of the land and the shophouse on the land ('the property') to Quill. However, because of the wrongful caveat on the land lodged by the respondents, the SPA could not proceed because the charge on the property in favour of Quill's financier could not be registered due to the caveat on the property, and Quill's financier would not drawdown the loan unless and until the charge was registered.
- B
- C [38] Subsequent to this court's decision in *Luggage Distributors*, Quill brought an action at the High Court against the caveators in *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* for summary judgment of the sum of RM222,548.46 being the interest rate on the balance purchase price owing under the SPA and Luggage Distributor's legal costs for removal of the caveat. Quill had agreed to bear these costs in exchange for not losing their 10% deposit under the SPA. The SAR allowed Quill's claim for the costs and entered summary judgment against the caveators.
- D
- E [39] The SAR's decision was upheld on appeal to judge in chambers. Abdul Malik Ishak J (as he then was) held:
- F *It is also my judgment that the plaintiff needs only to satisfy me that it suffers damage or loss by reason of the entry of the wrongful caveat. In short, the plaintiff has to prove that it is an aggrieved party. Here, the plaintiff was the purchaser of the property under the sale and purchase agreement and there was undue delay by reason of the private caveat lodged by the defendants. By reason of that very caveat, it necessitated applications to be made to the courts for its removal before the sale and purchase agreement could proceed ahead.* This is acknowledged by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd* when it said at p 720 of the report that, 'The existence of any caveat would, of course, frustrate all financing arrangements'. *It goes without saying that the plaintiff has suffered loss and/or damages by reason of the existence of that private caveat.* This was my judgment and I so hold accordingly. (Emphasis added.)
- G
- H [40] The High Court in *Quill Construction* allowed Quill's claim because Quill proved that it had suffered loss and damage as a result of the caveat lodged by the respondents on the property owned by Luggage Distributors, which this court in *Luggage Distributors* held was wrongful. The loss and damage suffered was the additional interest on the balance purchase price Quill had to pay to the vendor and the legal costs for the removal of the caveat.
- I [41] The High Court affirmed the legal principle that in assessing damages, the relevant considerations are: (a) remoteness of damages; and (b) mitigation of damages. It is trite that compensation may only be awarded for damages which are reasonably foreseeable: it cannot be ordered for all direct consequences of a wrongful act: see *Overseas Tankship (UK) Ltd v Morts Dock*

Engineering Co Ltd (The Wagon Mound) on appeal from the Supreme Court of New South Wales [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126; and s 74 of the Contracts Act 1950. A

Were the damages suffered reasonably foreseeable? B

[42] In this present case, the question we need to answer is whether the damages suffered by the respondent as a result of the appellant's wrongful caveat reasonably foreseeable.

[43] We find that it was reasonably foreseeable that a financier would not proceed with its financing/loan arrangements because a charge in its favour — as security for the loan — cannot be registered on any land that has a caveat on its title. This situation is similar to that in *Luggage Distributors*, where the presence of the caveat on the property caused the purchaser's financier to refuse the drawdown of the loan for the purchase of the property because a charge in the financier's favour could not be registered on the property due to the caveat. As observed by Gopal Sri Ram JCA (as he then was) in *Luggage Distributors*: C D

The existence of any caveat would, of course frustrate, all financing arrangements. E

[44] In this present case, the appellant's second caveat on the land frustrated the financing arrangements. Maybank cancelled its loan to the developer, and RHB postponed the drawdown of its bridging loan until the caveat was removed, as a charge in their favour could not be registered while the caveat remained on the land title. The terms of the loans required that a third-party charge in favour of Maybank and RHB, respectively, be registered on the land as security for the loans. F

[45] It was equally foreseeable that stamp duty for the Form 16A charge instrument had to be paid to LHDN to register Maybank's charge on the land for the loan. The developer paid this duty on behalf of the respondent, who is the owner of the land and the chargor. G

[46] Furthermore, it was foreseeable that the developer would have to look for alternative source of financing to replace the Maybank and RHB loans in order to continue the development and construction works. Any delay in the works would have the knock-on effect of delaying the completion of the project, resulting in breach of the sales and purchase agreements with the buyers of units of the development. Delays in delivery of the units would, among others, cause the developer to pay late payment charges to the buyers. The consequential financial losses to the developer for any delay in the completion of the project is an entirely foreseeable outcome of the wrongful caveat lodged on the land. H I

A [47] In addition, it is foreseeable that any short term financing will attract a higher interest rates. The developer had to pay a higher interest rate of 12%pa for the short term loans it had to take to replace the Maybank and RHB loans. We take judicial notice that under the Moneylenders Act 1951, the interest rate for secured loans from licensed moneylenders shall not exceed 12%pa.

B [48] For the reasons above, we find that the respondent's indemnification of the additional financing costs, ie the difference between the interest rates charged under the Maybank and RHB loans and the short term financing the developer had to incur and the stamp duty paid for the cancelled Maybank loan, was reasonably foreseeable and a necessary measure to mitigate the losses suffered as a result of the wrongful second caveat on the land.

Mitigation of damages

D [49] This court in *Luggage Distributors* recognised that reasonable mitigation costs, namely the additional interest on the balance purchase price because of the delay in completion of the sale caused by the wrongful caveat and the legal fees incurred in removing the caveat are recoverable as part of the statutory compensation under s 329(1) of the NLC. Gopal Sri Ram JCA (as he then was) in *Luggage Distributors* emphasised the compensatory nature of damages under s 329(1) of the NLC: namely, restoring the party to the financial position they would have been had the wrongful caveat had not been lodged.

E [50] This principle extends to losses that are reasonably incurred in order to mitigate the negative financial impact of the wrongful caveat lodged on any land.

F [51] In this present case, due to a wrongful caveat, the third party charges in favour of Maybank and RHB could not be registered on the land, resulting in the respondent's failure to fulfil its obligations under cl 4.1 of the JVA, where it is contractually required to provide the land as security for the loans and to execute all charges required by the developer to be created in favour of the financiers providing the loans. Accordingly, the respondent had to indemnify the developer to mitigate the losses caused by its breach of cl 4.1 of the JVA and to preserve the commercial viability of the project.

G [52] We find the appellant's argument that the respondent failed to mitigate its losses by the developer accepting the financing facilities offered by RHB, despite being aware of the caveat on the land, to be entirely without merit. Preventing the developer from accepting the RHB loan — which is essential for the progression of the project — solely on account of the appellant's wrongful caveat on the land is neither commercially reasonable nor consistent with the terms of the JVA.

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[53] But for the appellant's wrongful caveat, there would not have been any cancellation of the Maybank loan and disruption in the drawdown of the RHB loan — there would not have been any need for the respondent to indemnify the developer for the additional financing costs incurred in order to mitigate its losses. The respondent was forced to indemnify the developer due to the wrongful caveat lodged by the appellant on the land. The respondent's indemnification of the developer was a commercially necessary response to mitigate the foreseeable financial losses caused by the appellant's wrongful caveat on the land, which had exposed the respondent to a breach of the JVA and the project to higher financing costs and potential delay in completion.

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CONCLUSION

[54] Therefore, for these reasons, we find that the respondent is entitled to recover the amount that it had paid to indemnify the developer for the additional financing costs incurred owing to the wrongful caveat, even though there is no express indemnity clause in the JVA.

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[55] The respondent's entitlement is based on the compensatory principle in s 329(1) of the NLC in order to place the respondent in the same financial position it would have been had the appellant not lodged the wrongful caveat on the land.

E

[56] Accordingly, we find that the learned High Court judge did not fall into error in awarding the respondent compensation in the sum of RM748,931.37 with interest at the rate of 5%pa from 15 July 2020 until full payment.

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DECISION

[57] Therefore, for these reasons, we uphold the High Court's decision dated 9 January 2024 and dismiss this appeal with cost.

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Appeal dismissed; and High Court's decision affirmed.

Reported by Ashok Kumar

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